

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN EUGENE WHITEHEAD,

Defendant and Appellant.

C089967

(Super. Ct. No. CRF151827)

Defendant Brian Eugene Whitehead pleaded no contest to two felonies. Ultimately, the trial court imposed a prison sentence including various fines and fees. On appeal, defendant contends these fines and fees must be stayed pending an ability to pay determination. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In December 2016 defendant pleaded no contest to manufacturing a controlled substance (count one) and possession of a firearm as a felon (count five). (Health & Saf. Code, § 11379.6, subd. (a); Pen. Code, § 29800, subd. (a)(1).)¹ The trial court suspended imposition of sentence, placed defendant on three years of probation, and, as relevant here, imposed \$60 in criminal conviction assessments (Gov. Code, § 70373), \$80 court in court operations assessments (§ 1465.8), and a \$300 restitution fine (§ 1202.4, subd. (b)).

In July 2019, after multiple probation violations by defendant, the trial court revoked his probation and sentenced him to five years in prison for the manufacturing count and eight consecutive months for the firearm possession count. The court also reinstated the original fines and fees. Defendant asked that the fines and fees be stayed because he “does not have the ability to pay any of those fines,” offering to brief the “case law on this.” The court denied the request, indicating defendant could work in prison. After filing his notice of appeal, defendant requested an ability to pay determination under section 1237.2; the trial court also denied this request.

DISCUSSION

Defendant contends that, in light of *People v. Dueñas* (2019) 30 Cal.App.5th 1157, due process requires that this case be remanded for a hearing on his ability to pay the court operations and the court facility fees. Defendant also contends that his inability to pay the restitution fine renders it in violation of the excessive fines clause of the Eighth Amendment to the United States Constitution. We disagree with both contentions.

Our Supreme Court is now poised to resolve the due process issue, having granted review in *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844, which agreed with *Dueñas* that due process requires trial courts to conduct an

¹ Undesignated statutory references are to the Penal Code.

ability to pay hearing and ascertain a defendant's ability to pay before it imposes court facilities and court operations assessments. (*Kopp*, at pp. 95-96, review granted.) In the meantime, we join the courts that have concluded that *Dueñas* was wrongly decided. (See, e.g., *People v. Kingston* (2019) 41 Cal.App.5th 272, 282; *People v. Hicks* (2019) 40 Cal.App.5th 320, 329, review granted Nov. 26, 2019, S258946; *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067-1068 (*Aviles*); *People v. Caceres* (2019) 39 Cal.App.5th 917, 928-929.) We conclude the imposition of the challenged fees without consideration of ability to pay does not violate due process or equal protection and there is no requirement the trial court conduct an ability to pay hearing prior to imposing the challenged fees.

To the extent imposing potentially unpayable fees or fines on indigent defendants raises constitutional concerns, we agree that such challenges are properly analyzed under the excessive fines clause, which limits the government's power to extract payments as punishment for an offense. (*Aviles, supra*, 39 Cal.App.5th at p. 1069.) We disagree, however, with defendant's argument that his restitution fines are excessive.

“ ‘The Eighth Amendment prohibits the imposition of excessive fines. The word “fine,” as used in that provision, has been interpreted to be “ ‘a payment to a sovereign as punishment for some offense.’ ” [Citation.]’ [Citation.] The determination of whether a fine is excessive for purposes of the Eighth Amendment is based on the factors set forth in [*People v. Bajakajian* (1998) 524 U.S. 321 (*Bajakajian*)]. [Citation.]

“ ‘The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. [Citations.] . . . [A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of a defendant's offense.’ [Citation.]

“The California Supreme Court has summarized the factors in *Bajakajian* to determine if a fine is excessive in violation of the Eighth Amendment: ‘(1) the defendant's culpability; (2) the relationship between the harm and the penalty; (3) the

penalties imposed in similar statutes; and (4) the defendant’s ability to pay. [Citations.]’ [Citations.] While ability to pay may be part of the proportionality analysis, it is not the only factor. [Citation.]” (*Aviles, supra*, 39 Cal.App.5th at p. 1070.)

We review the excessiveness of a fine challenged under the Eighth Amendment de novo. (*Aviles, supra*, 39 Cal.App.5th at p. 1072.) Having done so here, we find the \$300 restitution fine is not grossly disproportional to the gravity of manufacturing a controlled substance and being a felon in possession of a firearm, or defendant’s culpability in these offenses. (See *Bajakajian, supra*, 524 U.S. 321; *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 728; *Aviles*, at p. 1072.) Further, ability to pay alone is not dispositive to an excessive fines analysis. (*Aviles*, at p. 1070, citing *Bajakajian*, at pp. 337-338 regarding the four factors for consideration.) Accordingly, we deny the request for remand and affirm.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Krause, J.